Supreme Court, U.S.
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No. 96-1984

In The

Supreme Court of the United States

October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

NONFEDERAL CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the District Court's factual determination, as affirmed by the Court of Appeals, that the Montana coal severance and gross proceeds taxes were not the cause of Shell Oil Company's failure to develop the Youngs Creek Mine present a substantial federal question or create an inter-circuit conflict?

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STATEMENT

The Court of Appeals affirmed the District Court's determination that enactment of the Montana coal severance and gross proceeds from coal taxes did not interfere with the contractual or business relationship between cross-petitioner Crow Tribe and Shell Oil Company. Pet. App. 12-14; COL ¶¶ 36-46, Pet. App. 54-57.[1] The Tribe, but not the United States, seeks review of the Ninth Circuit's judgment on this issue. Although the District Court's determination was grounded in the particular facts material to the claim, the cross-petition largely omits discussion of them. The Tribe's failure in this regard illustrates why the United States and it pursued a quite peculiar quasi-contract claim with respect to Westmoreland Resources, Inc.'s tax payments: The facts did not support recovery under a more straightforward theory seeking damages because of the alleged effect of the taxes on coal development within the Crow Reservation or the ceded strip.

I. In June 1972 the Tribe and Shell entered into a coal mining lease agreement under the Omnibus Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. Defs.' Ex. 563. The leased lands totaled over 30,000 acres within the Reservation. It was Shell's intention to develop a facility, known as the Youngs Creek Mine, on this acreage. In anticipation of the mine's construction, Shell secured coal contracts from Cajun Electric Power Cooperative and

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[1] All references to "Pet. App." are to the appendix to the Petition in No. 96-1829.

Houston Lighting and Power Company whose requirements would be fulfilled from Youngs Creek production. Defs.' Exs. 564, 565. These contracts were signed November 1974 and January 1975. They eventually were canceled by mutual agreement in February and March 1981. Defs.' Exs. 583, 584.

Even prior to execution of the Cajun Electric and the Houston Lighting contracts, Shell was on notice that the Tribe was dissatisfied with the 1972 lease. In July 1974 the Tribe adopted Resolution 75-06A declaring "that all tribal 'coal mining leases, whether existing or pending, are hereby declared null and void . . . and are of no effect whatsoever.' " Defs.' Ex. 600 at 14. Almost a year later, the Tribe's attorney "informed Shell that the Shell Lease was declared invalid and void by . . . Resolution #75-06A and further advised Shell that any additional investments by it, in connection with such lease, would be at Shell's own risk and that no subsequent act [of the Tribe] would be construed as a waiver of [the Tribe's] right to challenge the validity of the Shell Lease." *Id.*

The tribal resolution and its attorney's letter were not mere bargaining rhetoric. In 1976 the Tribe initiated suit against the United States, Shell, and several other mining companies with which the Tribe had coal contracts under the Indian Mineral Leasing Act. *Crow Tribe v. Kleppe*, No. CV-76-10-BLG (D. Mont.). The Tribe sought to void Shell's 1972 lease on various grounds, including the Department of the Interior's failure to comply with federal regulations limiting coal leases to 2560 acres unless

certain findings were made[2] and the agency's failure to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d, prior to approving the leases. Defs.' Ex. 598. On the basis of the Ninth Circuit's decision in *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1973),[3] the Department conceded that it had erred in not preparing an environmental impact statement prior to the leases' approval (Defs.' Ex. 601 at 1-2) and, over one year into the litigation, agreed that the coal leases were invalid because the acreage limitation in 25 C.F.R. § 171.9(b) had been exceeded without the requisite findings. Defs.' Exs. 606, 611 at 2. In May 1978 the District Court granted partial summary judgment to the Tribe, voiding the Shell lease's approval for failure to comply with § 171.9(b). Defs.' Exs. 609, 610.

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[2] At the time Shell's and the other mining companies' leases were approved by the Department, 25 C.F.R. § 171.9(b) restricted leases to 2560 acres unless the Commissioner of Indian Affairs first found "that the approval of . . . larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plants or other industrial facilities on or near the reservation." Defs.' Ex. 597 at 6-7.

[3] In *Cady* the Court of Appeals concluded that the Department of the Interior's approval of Westmoreland Resources' coal leases on the ceded strip constituted a "major federal action" within the scope of 42 U.S.C. § 4332(a)(C). 527 F.2d at 793. In so holding, the court stated that "[n]either the status of Indians nor the manner in which their lands are held in trust justifies removing from the 'major federal action' category the 1972 approval of the leases in this case." *Id.*

It is thus unsurprising that Shell gave notice in 1976 to Cajun Electric and Houston Lighting under their contracts' force majeure provisions that it would be unable to supply coal from the Youngs Creek Mine as previously agreed and that those utilities should satisfy their coal demands elsewhere – at least until the mine's status could be resolved. Defs.' Ex. 576 at 5-8; *see also* Defs.' Exs. 572, 573; Pls.' Ex. 221; I 1984 Tr. 95:10-96:7. It is equally unsurprising that Shell ceased development efforts at Youngs Creek upon the filing of the *Kleppe* litigation. I 1984 Tr. 116:16-21.

Discussions between the Tribe and Shell to resolve their differences nonetheless had begun prior to the filing of the *Kleppe* suit, with Shell offering in February 1976 to enter into "an entirely new coal mining lease." Defs.' Ex. 566. Among the terms in this offer was a provision relating to payment of tribal taxes:

> The sum of all taxes, including, but not by way of limitation, license fees, reclamation fees, and other similar fees, levied against Shell by the Crow, the State of Montana, and Big Horn County shall not exceed the sum which would be levied by the State of Montana and Big Horn County if Shell's coal mining operations were located on non-Indian lands in Big Horn County. Shell will cooperate with the Crow in arriving at a settlement of the differences between the Crow and the State of Montana concerning the authority of the State of Montana to levy taxes on coal produced from the reservation, including a payment of not to exceed $35,000.00 to reimburse the Crow for the expense of employing tax counsel.

Id. at 2. Although another four years passed until a new lease agreement was reached whose terms differed markedly from Shell's initial offer, the tax provision included in that lease was substantially identical to the February 1976 proposal – omitting only the attorney's fee payment provision. I 1984 Tr. 89:16-90:18; Pls.' Ex. 268 at art. 18.02; Defs.' Exs. 569, 570, 574, 575, 577. One inference from the similarity of the two tax provisions is that other differences existed between the Tribe and Shell, and evidence at the 1984 trial explored those differences.

That evidence revealed an intense debate between 1975 and 1980 within the Tribe over the most prudent approach to reservation coal development. Aside from the moratorium on such development contained in Resolution No. 75-06A and the *Kleppe* litigation, this debate led to political turmoil and various changes in the tribal officials responsible for dealing with Shell. I 1984 Tr. 120-22; VII 1984 Tr. 1091-96; Defs.' Ex. 531 at 11-15, 36-39. The debate also influenced the Tribe's negotiating demands, which included seeking greater control over the mining operations and a smaller lease area. I 1984 Tr. 86-87. A final difficulty arose with the United States itself: Although signed by the Tribe and Shell in May 1980, the new lease was not approved by the Department of the Interior until January 1983. Defs.' Ex. 585. No evidence suggested the delay in the Department's approval was attributable to the state taxes, and the delay was identified by a Shell representative as an important factor in cancellation of the Cajun Electric contract. I 1984 Tr. 108:22-109:6.

II. The Tribe and the United States first raised a claim for retroactive relief directed to the failure of Shell

to develop the Youngs Creek Mine when, shortly before conclusion of discovery in connection with the 1994 trial, they sought leave to file amended complaints alleging tortious interference with business or contractual relationships. CR 585, 588.[4] The District Court denied their motions in July 1993, stating in part that the plaintiffs had been allowed to amend their complaints in the past and that "[t]o allow [the amendments] could change the course of the litigation." CR 637 at 4. The court also denied a motion to reconsider this ruling two months before the trial itself. CR 669. The court nevertheless permitted over objection the Tribe and the United States to offer evidence concerning the alleged damages flowing from nondevelopment of the Youngs Creek project (I 1994 Tr. 100) and addressed the merits of their claim in its decision. The District Court's findings discussed the *Kleppe* litigation and observed further that among issues dividing the Tribe and Shell had been the former's "concerns about Shell's management rights and [the Tribe's] own sovereignty relating to control of coal mining operations on the reservation," "concerns over the size of the lease," and "concerns about Shell providing its members

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[4] Each proposed amended complaint sought monetary recovery for Montana's and Big Horn County's alleged unlawful interference with the Tribe's business and contractual relationships through application of the severance and gross proceeds taxes to coal underlying the Crow Reservation and the ceded strip. The proposed complaints additionally sought recovery of taxes paid with respect to coal produced in Montana and sold to Houston Electric. In its motion for leave to file the amended complaint, the Tribe stated that it intended to rely on facts established during the 1984 trial for purposes of establishing liability. CR 586 at 6-7.

employment opportunities." FOF ¶ 70, Pet. App. 39. It continued on to note that Shell officials had testified at the 1984 trial and

> identified other impediments to successful negotiations with the Tribe. There was concern with the Crow Land Use Ordinance in that Shell feared the Tribe would impose constraints Shell could not abide. For periods, there w[ere] internal conflicts among tribal factions, which clouded who was the true negotiating agency for the Tribe. Various resolutions were passed by the tribal council restraining the authority of tribal officers and entities from representing and negotiating on behalf of the Tribe.

FOF ¶ 75, Pet. App. 40. While the Tribe was concerned also with the financial terms of the lease and the state taxes "left less room for the Tribe and Shell to negotiate more favorable financial terms" (FOF ¶ 76, Pet. App. 41), the District Court found that

> [t]he record does not support the assertion that the Montana coal taxes were responsible for the loss of revenue due to the protracted negotiations between Shell and the Tribe. The issues of acreage coverage, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions were definite and sharp points of disagreement which clearly delayed successful lease negotiations.

FOF ¶ 79, Pet. App. 41. The latter issues "were the causative factors for the Youngs Creek facility not being developed to supply the Cajun and HL&P contracts." FOF ¶ 81, Pet. App. 42. Thus, the Tribe's statements in the cross-petition that no "evidence presented by any witness

that the Tribe and Shell would not have been able to agree on an amended lease if Montana had not sought to apply its taxes to the Tribe's coal" and that "[a]ll of the issues involved in the Tribe/Shell negotiations had been resolved in the November 1974 amended lease with Westmoreland" simply do not parse with the record. Cross-Pet. at 7. Not only was there ample evidence to the contrary, but the District Court so found.

In its conclusions of law, the District Court applied these factual findings to traditional intentional interference with contractual or business relationship standards and held that "[t]he state taxes certainly did not cause Shell to breach its coal lease agreement" since it was the Tribe which sought to invalidate the agreement (COL ¶ 40, Pet. App. 55) and that other factors impeding the renegotiation process militated against assigning "a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages" (COL ¶ 44, Pet. App. 56). In short, the court did "not find that the damages and losses claimed by the Tribe due to the loss of Shell's business resulted from the actions of the defendants." *Id.*

The Court of Appeals affirmed, crediting the District Court's determination that

> although taxes may have impaired the Tribe's ability to lease its coal, they were only one factor in the failure of the lease negotiations, and other factors were clearly more influential: the Tribe itself repudiated Shell's 1972 lease before the state taxes were imposed, and in 1976 the Tribe successfully sued to invalidate the lease on the ground that the Department of Interior had approved it without making certain findings

> required by law. Other evidence showed that Shell officials were concerned about internal conflicts among the Tribe's leaders and disputes as to who had authority to represent the Tribe in negotiations with Shell.

Pet. App. 13-14. In a footnote focused on by the cross-petition, the Ninth Circuit rejected the contention that "Montana should bear the burden of proving that the unlawful taxes did *not* cause the harm." *Id.* at 13 n.4. It distinguished *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946), on the ground that *Bigelow* dealt with the issue of uncertainty in the amount of damages and stated no reason had been offered for extending "to this area the Supreme Court's analysis of proof of causation in securities cases" as exemplified by *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Id.*

ARGUMENT

The cross-petition does not present a substantial federal question or an inter-circuit conflict warranting review. *See* S. Ct. R. 10(a) & (c). The facts, as the District Court found, showed that the state taxes did not cause nondevelopment of the Youngs Creek Mine. That nondevelopment resulted instead from the Tribe's 1974 resolution purporting to void Shell's and other coal producers' leases, the subsequent litigation in *Kleppe* to implement that resolution, the consequential inability of Shell to supply its contracts with Cajun Electric and Houston Lighting from the mine as had been anticipated, and the Tribe's own internal division over the conditions under which coal mining was to be conducted on the

Reservation. Thus, aside from the inapposite nature of the authority it relies upon, the cross-petition simply fails to come to grips with the District Court's findings, which were supported amply by the record, that the Tribe's actions, not the taxes, caused the Youngs Creek Mine not to be developed and with the fundamental principle that those findings are entitled to deference under Fed. R. Civ. P. 52. The cross-petition does nothing more than attempt to clothe a garden-variety attack on a set of factual determinations in the dress of misapplication of allegedly applicable legal standards. The contention that certiorari should be granted to review the disposition of the Shell claim is made even more problematic by the unavailability of relief against the state cross-respondents by virtue of the Eleventh Amendment.

I. The Lower Courts' Disposition of the Shell Claim Neither Presents a Substantial Federal Question Nor Conflicts With This Court's or Other Courts of Appeals' Decisions.

A. The Ninth Circuit's affirmance of the District Court's determination that the Montana taxes did not cause the breakdown of the Tribe's relationship with Shell and the attendant nondevelopment of the Youngs Creek Mine is patently unworthy of review by this Court. The Court of Appeals properly and reasonably agreed with the District Court's findings. In so doing, it did not establish any new principle of law, much less one that must be addressed by this Court.

The District Court found, and the Ninth Circuit agreed, that numerous factors other than Montana's coal

taxes caused the Youngs Creek facility not to be developed as Shell had planned initially. Most importantly, the trial court concluded that the 1972 Shell contract was terminated as a result of litigation initiated by the Tribe on grounds unrelated to the state taxes and that the delay in consummating a successor contract and securing secretarial approval was attributable to reasons other than the taxes' existence.

Additional causative factors found by the District Court included the Tribe's unilateral termination of the 1972 lease; the ensuing *Kleppe* litigation; Shell's concerns over tribal regulation that would interfere materially with its ability to extract coal efficiently; the amount of acreage subject to the lease; and options on additional tracts for mining purposes. Underlying these points of disagreement was the Tribe's own internal division over the nature and scope of reservation-based coal mining.

The Ninth Circuit's affirmance of these findings was entirely consistent with the highly deferential standard of review under Rule 52(a). Indeed, it is impossible to conclude from the record below that the District Court's "account of the evidence is [im]plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *see, e.g., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been

committed' "). The Tribe's challenge to the factual determinations of the lower courts plainly falls outside the range of issues warranting this Court's attention.[5]

B. Faced with this overwhelming evidence and the dictates of Rule 52(a), the Tribe claims that the lower courts should have shifted the burden of proof on the issue of causation to the cross-respondents and that, in failing to do so, they created a conflict with two decisions of this Court and their progeny. This transparent effort to convert a factual question into a legal one is unavailing. As an initial matter, the evidence in this case was so lopsided that no reasonable person could conclude that the state taxes caused the breakdown of the Tribe's relationship with Shell regardless of who bore the burden of persuasion. That said, the decisions on which the Tribe

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[5] It bears noting that the Tribe's reference to the Court of Appeals' statement in *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988), that "[b]ecause of the taxes, the lessee cannot find a buyer, making it difficult for Crow to find a lessee" (819 F.2d at 903, Pet. App. 108) is not inconsistent with the District Court's or the Ninth Circuit's analysis in the decisions giving rise to this proceeding. Cross-Petition at 9. The Tribe had found a lessee, Shell, first in 1972 and again in 1980, and the statement thus appeared concerned with the situation following Shell's termination of the 1980 contract in December 1985. CR 302. The Tribe, however, offered no evidence at the second trial estimating damages with respect to the cancellation of the 1980 lease. *See* Pls.' Ex. 319 at 37-53. Moreover, since Shell had committed itself to paying a tax to the Tribe comparable to the state taxes, it is difficult to fathom how the Tribe was harmed by the prospect of the Montana taxes' being imposed; i.e., to the extent the state taxes were claimed to have a negative impact on Shell's ability to find buyers for reservation coal, the tribal tax would have had the same effect.

principally relies – *Bigelow v. RKO Pictures*, 327 U.S. 251 (1947), an antitrust case, and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), a securities case – simply have no applicability to the situation involved here. Whatever merit the Tribe's argument might have in another factual context, its attempt to stretch *Bigelow*, *Mills* and sundry authority from other courts of appeals to encompass this case, and thereby to establish either a substantial federal question or a conflict among the circuits justifying review, is thus wholly untenable.[6]

Bigelow is a case about antitrust damages. It arose from a claim under the Sherman and Clayton Acts alleging a conspiracy to deprive an independent theater's owners of the opportunity to show first-run films as soon as they became available to theaters affiliated with various film distributors. A jury verdict was returned in the plaintiffs' favor, but on appeal the judgment was reversed because, in the court of appeals' view, the evidence of

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[6] The Tribe contends that the Court of Appeals' analysis concerning the Shell claim conflicts with various decisions from other circuits, most dealing with federal antitrust claims and all applying *Bigelow*. Cross-Pet. at 20-21; *see Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 891 F.2d 1127 (4th Cir. 1989) (upholding jury verdict that found liability under federal antitrust laws), *rev'd on other grounds*, 499 U.S. 365 (1991); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellshaft*, 828 F.2d 1033 (4th Cir. 1987) (same); *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir. 1964) (same); *Switzer Bros., Inc. v. Locklin*, 297 U.S. 39 (7th Cir. 1962) (affirming judgment of district court directing accounting under federal antitrust laws); *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396 (8th Cir. 1991) (federal habeas corpus proceeding); *United States ex rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975) (same). These cases add nothing. *Bigelow* is inapposite, and so are its progeny.

damages had been insufficient to allow the case's submission to the jury. 327 U.S. at 254. In turn reversing the circuit court, this Court first observed the evidence made it "indisputable that the jury could have found . . . that, other things being equal, the establishment of the discriminatory release system was damaging to the [plaintiffs] who were relegated by it to a playing position inferior to that of their competitors." *Id.* at 260. It then rejected the argument that the plaintiffs' evidence provided an insufficiently certain basis upon which to calculate damages. In thus ruling, the Court reaffirmed the general rule that damages may not be "based on speculation and guesswork" (*id.* at 264) but, pointing to prior decisions which had sustained damage awards where "[t]he tortious acts had . . . precluded ascertainment of the amount of damages more precisely," held that antitrust damages could be proved "by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Id.* at 264. The Court concluded that this comparison was a sufficient basis for the jury's computation of damages, where "the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of damage." *Id.* at 266.[7]

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[7] Justice Frankfurter dissented from the Court's decision on the basis that the issue was not the amount of damages but whether the conspiracy among the film distributors and their affiliates had caused any injury. *Id.* at 267 (Frankfurter, J., dissenting). He distinguished between uncertainty as to the existence of an injury from wrongful antitrust conduct and uncertainty as to the monetary value of such injury once shown. *Id.* at 268. The majority opinion, however, treated the issue not as causation but as the appropriateness of using before and after

Mills, unlike *Bigelow*, dealt directly with the issue of the burden of proof attendant to showing that a statutory violation had occurred. The question, as framed by this Court, was "what causal relationship must be shown between [a materially false or misleading proxy] statement and the merger to establish a cause of action" for violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The challenged merger had been approved in part by the use of proxies from a substantial group of minority shareholders whose votes the district court had deemed " 'necessary and indispensable to the approval of the merger.' " 396 U.S. at 379. On interlocutory appeal under 28 U.S.C. § 1292(b), however, the court of appeals, ignoring the fact that the minority shareholders' votes had been essential to the merger's approval, held the proper standard for determining liability was whether "the merger had merit and was fair to the minority shareholders." *Id.* at 380. This Court reversed and held as follows:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is

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income as the measure of damages. *See* II Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 365b2, at 240-41 (rev. ed. 1995).

> designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

396 U.S. at 387; *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972) ("[a]ll that is necessary is that the facts withheld be material [under Rule 10b-5, 17 C.F.R. § 240.10b-5 (1996)] in the sense that a reasonable investor might have considered them important in the making of the decision"). The Court accordingly determined that the district court had not erred in granting summary judgment as to liability. *Id.* at 389.

The holding in *Mills* was specific to the securities context and turned on (1) the definition of the term "material" and (2) the need to fashion a rule that would permit the determination of causation when thousands of transactions are involved. That holding has no application in this case which involved a straightforward issue of causation, in which there was a determination by the finder of fact that the state taxes did not cause the breakdown in the relationship between the Tribe and Shell, and where there was no problem in determining causation in the time-honored way – by evaluating the facts under ordinary burden of proof standards. The Ninth Circuit did not create any conflict in declining to extrapolate from the holding in *Mills*, or in *Bigelow*, a generalized rule that would dispense with ordinary burden-of-proof requirements.[8]

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[8] *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-06 (1991) (refusing to extend *Mills* causation standard to minority shareholders whose votes were not required for

II. The Absence of a Substantial Federal Question Is Reflected Further in the State Cross-Respondents' Immunity from Suit Under the Eleventh Amendment.

Ignored in the cross-petition is the state cross-respondents' immunity under the Eleventh Amendment from retroactive relief on the basis of the Tribe's claim, regardless of whether the relief is characterized as legal or equitable in nature. *Blatchford v. Village of Noatak*, 501 U.S. 775 (1991); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). While those cross-respondents' immunity could not be asserted against the United States, the Government has not sought review of the Ninth Circuit's rejection of the Shell claim and thus is bound by the lower courts' judgment on this issue. *See, e.g., Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).[9]

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approval of the challenged transaction); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 51 (1977) (Blackmun, J., concurring) (distinguishing suit by tender offeror to recover damages from *Mills*-like nondisclosure violation because in the former situation "causation is a far more complex issue"); *see generally* 2 Alan R. Bromberg & Lewis D. Lowenfels, *Securities Fraud & Commodities Fraud* § 5.7(250) & (260), at 5:69-5:82 (1990) (discussing the relationship of reliance and causation under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5).

[9] Any reliance by the Tribe on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that it may pursue independently a claim for retroactive relief against the state cross-respondents is misplaced. This Court held there only that the Eleventh Amendment did not preclude intervention by five tribes in an

The lack of available relief against the state cross-respondents renders the Tribe's claim even more problematic than it otherwise plainly is. The county cross-respondents were obligated under state law to impose and collect the gross proceeds tax to the extent taxable production occurred. 1975 Mont. Laws ch. 525, § 11, Pet. App. 242. Since Big Horn County had no opportunity to impose or collect the gross proceeds tax with respect to on-reservation mining activity by Shell, the gravamen of the Tribe's claim must be that the mere existence of the two taxes interfered with its business or contractual relationship with Shell. Yet it is clearly farfetched to suggest the County intentionally interfered with the business or contractual relationship between the Tribe and Shell, or somehow "violated" federal law, merely because the Montana legislature enacted a statute whose potential application eventually was held preempted to on-reservation coal production.[10]

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ongoing original proceeding where the United States already was a party and was raising claims on the tribes' behalf. *Id.* at 612, 614. The Court recognized, however, that the United States' actions were binding on the tribes regardless of their intervention. *Id.* at 615. The situation differs markedly here because the United States has not challenged the Court of Appeals' decision concerning the tortious interference claim and therefore is bound by it.

[10] The Tribe did seek to recover under a quasi-contract theory taxes assessed with respect to off-reservation production of nontribal coal sold to Houston Lighting on the theory that, but for the existence of the state taxes, that production would have occurred on the Crow Reservation. CR 585, Fifth Am. Compl. (lodged) ¶¶ 30, 31. However, there is no dispute that those taxes were assessed and collected lawfully and that nothing Big Horn County did affected Houston Lighting's decision to source its coal from the off-reservation mine.

Nevertheless, even if under some theory Big Horn County could be held liable for retroactive relief merely because under state law it would have collected and received a portion of the gross proceeds tax had the tax been imposed on Shell, the courts below concluded that the *combined* effect of the severance and gross proceeds taxes was not responsible for Shell's failure to develop the Youngs Creek Mine. The gross proceeds tax rate during the period material here was approximately five percent of the "contract sales price" as determined under the severance tax statute, while the severance tax rate was 30 percent of the contract sales rate. FOF ¶¶ 31, 34, Pet. App. 25, 26. The evidence thus hardly supports the theory that the gross proceeds tax, standing alone, was sufficient to interfere impermissibly with the Shell relationship. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 169 (1989) (sustaining 8 percent oil and gas tax against preemption claim). Given such a record, the contention that a substantial federal question or an inter-circuit conflict exists is insupportable.

CONCLUSION

For the foregoing reasons, the cross-petition for certiorari should be denied.

Respectfully submitted,

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